IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

MICHAEL SMITH, Plaintiff, v. CENTRAL SECURITY BUREAU, INC., and JAMES ROWE, Defendants.	)	CIVIL ACTION NO. 5:00CV00057 MEMORANDUM OPINION JUDGE JAMES H. MICHAEL, JR.

This matter comes before the court on the parties' May 1, 2002 cross motions for summary judgment and the defendants' "Motion for Default Judgment With Respect to Opt-in Plaintiffs," filed July 15, 2002. The above-captioned civil action was referred to the presiding United States Magistrate Judge for proposed findings of fact, conclusions of law, and a recommended disposition. *See* U.S.C. § 636(b)(1)(B). In his August 21, 2002 Report and Recommendation, Magistrate Judge B. Waugh Crigler rendered to this court a report setting forth findings, conclusions, and recommendations for the disposition of the aforementioned filings. The defendants filed timely objections to portions of the Magistrate's Report and Recommendation. The plaintiff, in turn, filed a timely response to the defendants' objections.

The court has performed a *de novo* review of those portions of the Report and Recommendation to which objections were made. *See* U.S.C. § 636(b)(1)(C) (West 1993 and Supp. 2000); FED.R.CIV.P. 72(b). Having thoroughly considered the entire case, all relevant law, and for the reasons stated herein, the court shall GRANT the plaintiff's Motion for Partial

Summary Judgment (on issues of liability); DENY the defendants' Motion for Summary Judgment; GRANT, IN PART, the defendants' Motion for Default Judgment and DISMISS the claims of opt-in plaintiffs McCormick, Brandon, Domagala, Lawrence, and Hinton, but DENY the Motion for Default Judgment in all other respects, and ACCEPT the Report and Recommendation of the Magistrate Judge.

I.

The court will rely on the Magistrate Judge's recitation of the facts involved in this matter. In brief, this is an action in which the plaintiff alleges that his employer failed to pay overtime as required by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. Plaintiff Michael Smith initiated the above-captioned civil action on June 29, 2000, "*individually and on behalf of all current or former employees* of Defendant Central Security Bureau, Inc. ("CSB") who acted as 'Field Supervisors.'" Complaint at 1 (emphasis added). Neither before nor after this case was certified as a collective action did Smith file a consent form expressing his willingness to join as a party plaintiff in this action. The defendants, in their November 8, 2000 answer to the original complaint, contested whether the case could be brought as a collective action. Then, on April 19, 2001, the presiding Magistrate Judge granted the Plaintiff's Motion to Compel Production of a Putative Class List, and set a discovery and motions deadline for resolution of whether the case could proceed as a collective action. The defendants objected to the Magistrate's ruling and asked him to reconsider. On May 31, 2001, the Magistrate Judge granted the motion for reconsideration, allowing class-related discovery to move forward, but restricting production of evidence to anonymous salary information regarding "Field Supervisors."

On February 19, 2002, after conducting a hearing earlier in the month, the Magistrate Judge granted the motion to certify the collective action, relying, in part, on the deposition testimony of CSB's corporate representative. That evidence revealed that Michael Smith was "similarly situated" to the other Field Supervisors in both duties and methods of compensation. Soon thereafter, thirteen plaintiffs opted into the collective action by filing consents to join the action. Plaintiff Smith filed his consent, or "opt-in" form, on May 14, 2002.

Both parties filed motions for summary judgment on May 1, 2002. After these pleadings were filed, but before the responses were due, the Magistrate Judge granted the plaintiff's Motion to Reopen Discovery on three discrete issues: (1) information relevant to the "window of correction" defense raised by the defendants in their dispositive motion papers; (2) evidence affecting the statute of limitations defense against the opt-in plaintiffs; and (3) damages allegedly suffered by the opt-in plaintiffs.

Then, on July 15, 2002, the two sides each filed their respective responses to the May 1, 2002 motions for summary judgment. Additionally, the defendants filed a motion seeking entry of default and for default judgment against all thirteen opt-in plaintiffs for their alleged failures to cooperate in discovery after opting into the collective action. After hearing argument on these motions, the Magistrate Judge entered his August 21, 2002 Report and Recommendation.

II.

Before this court can adequately address the merits of the motions now before it, it is first necessary to review the underlying factual background of this matter. On June 17, 1999, plaintiff Michael Smith accepted a promotion to the position of "Field Supervisor" with defendant Central

Security Bureau, Inc. ("CSB").[1] At the time Smith accepted the promotion, he signed an employment contract that denominated the position as "salaried," but which fixed the terms of his pay at an hourly rate of $6.50. Smith was also given a copy of CSB's employment policy, which, in pertinent part, provided that "[s]alaried employees are expected to work forty (40) hours each week. If you do not, you will only receive compensation for the hours you work. The state labor law says 'NO WORK; NO PAY.'" Pl.'s Mot. for Part. Summ. J. Ex. 5 (emphasis in original).

While the plaintiff often worked well in excess of forty hours per week,[2] Smith, on two occasions, worked less than the requisite forty hours in a week. From June 25, 1999 through July 8, 1999, the plaintiff worked seventy-nine hours and from January 8, 2000 through January 20, 2000, Smith worked thirty-nine hours. On both occasions Smith's pay was docked exactly $6.50 for each hour under forty not worked. During the aforementioned pay periods, Smith was paid $6.50 per hour of work, which was the rate of pay set forth in his employment contract.

Additionally, the evidence reveals that while the predominance of the other opt-in plaintiffs never worked less than forty hours in any given week, at least one other former opt-in plaintiff experienced similar deductions for what are known in this action as "partial-day

[1] Defendant James Rowe is the founder and president of CSB.

[2] For instance, in the two-week pay period from October 15, 1999 to October 28, 1999, Smith worked one hundred eighty-six hours. In the following two-week period he worked two hundred hours.

absences." Robert Ennis[3] was hired at a weekly "salary," as the defendants denominate the compensation, of $560, calculated at the rate of $7 per hour multiplied by forty hours. Ennis was paid $553 instead of his "salary" of $560, which reflected a deduction of $7.00 for the one hour he fell short of forty hours for that pay period. Moreover, during the pay period of May 28, 1999 through June 10, 1999, Ennis worked a total of seventy-eight and one half hours. Consequently, he was paid $549.50, again reflecting a deduction of $7.00 for the one and one half hours Ennis fell short of the forty hour minimum. There is no evidence in the record establishing that any Field Supervisor who experienced "partial-day absences" ever actually received a full salary as if he or she had worked the entire forty-hour week.

III.

On May 1, 2002, the parties filed cross motions for summary judgment. A party is entitled to summary judgment when the pleadings and discovery show that there are no genuine issues as to any material fact, and that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[S]ummary judgment ... is mandated where the facts and the law will reasonably support only one conclusion." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). If the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party, then there are genuine issues of material fact. *See Anderson*, 477 U.S. at 248. All facts and inferences shall be drawn in the light most

[3] It is worthy of note that by court order dated September 5, 2002, and pursuant to his request, Robert Ennis's claim was dismissed from this action.

favorable to the non-moving party. *See Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 227 (4th Cir. 2000). Guided by these principles, the Magistrate Judge recommends that this court grant the plaintiff's Motion for Partial Summary Judgment (on issues of liability) and deny the defendants' Motion for Summary Judgment in every respect.

IV.

A. Objection 1 - *Whether Plaintiff Smith may Proceed*

Simultaneously in Individual and Collective Capacities:

Defendant CSB has articulated three objections to the Magistrate Judge's Report and Recommendation. First, defendant CSB objects to the Magistrate's "recommendation that Smith may proceed simultaneously in individual and collective capacities." Defendants' Objections, page 2. In order to address the defendants' objection, the court must first consider the statute under which the plaintiff initiated the present action.

The FLSA allows employees to initiate legal actions for themselves and on behalf of similarly situated others. Specifically, the statute authorizes "one or more employees" to initiate suit "for and in behalf of himself *or* themselves and other employees similarly situated." 29 U.S.C.§ 216(b) (emphasis added). While it is clear that the FLSA contemplates both individual and collective actions, the defendants maintain that when Smith's motion to certify the case as a collective action was granted, his individual claim was supplanted by the collective action. According to CSB, therefore, the plaintiff cannot proceed simultaneously in individual and collective capacities.

Unfortunately, as the Magistrate Judge notes, there is little guiding decisional authority

in the circuits, let alone in the Fourth Circuit, pertaining directly to the circumstances currently before the court. Although the Fourth Circuit has never expressly held that a plaintiff may bring an action in such dual and individual capacities, it is also true that the court has never foreclosed such a possibility, despite multiple opportunities to do so.

First, in *Lee v. Vance Executive Protection, Inc.*, 7 Fed. Appx. 160 (4th Cir. 2001) (unpublished), the court held that when multiple plaintiffs attempt to set forth the capacity in which the suit is brought by precisely copying the statutory language, the complaint is to be construed as one pleading a collective action and not separate individual actions brought by multiple plaintiffs under the FLSA. After discussing the case in detail, the Magistrate Judge noted that the principle difference between *Lee* and the case at bar is that Smith, the named plaintiff in the present matter, "did not employ merely the statutory language interpreted in *Lee* to plead the capacities in which he was instituting the case." Report and Recommendation, page 16. Instead, Smith instituted the case "individually and on behalf of others."

The defendants contend that while Smith may not have precisely copied the statutory language, his "pleading parallels the statutory definition of a collective action under the FLSA, though he did not reiterate the statutory language." Defendants' Objections, page 15. Put differently, CSB argues that the variance between Smith's pleadings and the statutory language is a difference without a distinction.

Although Smith's pleading was similar to the statutory language pled in the complaint at issue in *Lee*, which the court construed as one pleading a collective action, it is not identical. A logical inference from Smith's failure to copy precisely the statutory language of the FLSA in his

complaint, coupled with the seemingly unambiguous language employed by the plaintiff, is that Smith was attempting to avoid the result reached in *Lee*. Put differently, and contrary to the defendants' contention, Smith wanted to make clear the dual capacities in which he was bringing the case. The plaintiff, therefore, stated that he was instituting the action "individually *and* on behalf of [others]." Complaint, page 1 (emphasis added).

The defendants, however, cite to *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1133 (4th Cir. 1996) for the proposition that "[u]nder the most basic canon of statutory construction, [a court] begin[s] interpreting a statute by examining the literal and plain language of the statute." The same proposition applies to a court's construction of a party's filings – a court begins interpreting a pleading by examining the literal and plain language of that pleading. Here, Smith instituted the action "individually and on behalf of others." The plain language of the aforementioned language is open only to one interpretation, namely, that Smith was attempting to proceed in a dual capacity. If the complaint does not indicate Smith's intent to proceed in a dual capacity, the court is at a loss to understand how the plaintiff could have obtained such a result.

Although Smith unambiguously stated his intent to proceed in a dual capacity, the inquiry is not over. The court next must discern if one is permitted to plead simultaneously both individually and collectively. As noted earlier, although the Fourth Circuit has never expressly held that an FLSA plaintiff may plead in a dual capacity, it has also never foreclosed the possibility. Notwithstanding the *Lee* decision, the Fourth Circuit came closest to disclosing its position on the aforementioned issue in *In re Food Lion, Inc.*, 151 F.3d 1029 (4th Cir. 1998)

(unpublished).

Not unlike the *Lee* court, the *Food Lion* court made an effort to discern from the pleadings whether the plaintiffs had brought individual cases. A careful reading of *Food Lion* leads the court to the same conclusion reached by the Magistrate Judge. Namely, that the court suggests that "where the record reveals an intent to file an individual claim, and the individual claim is timely filed, it should be allowed to continue, notwithstanding the individual plaintiff's failure to timely file a consent to join the collective action." Report and Recommendation, page 19. Here, the record clearly reveals plaintiff Smith's intent to proceed in a dual capacity.

In their papers, the defendants contend that the Magistrate Judge "construes two Fourth Circuit decisions to allow dual capacity suits based upon what those decisions did *not* hold." Defendants' Objections, page 15. This is certainly true. It is also true, however, as noted above, that the Fourth Circuit never expressly foreclosed the possibility that a plaintiff or group of plaintiffs could bring an action in such dual individual and collective capacities, so long as the complaint clearly put the employer and the court on notice of such. Given the Fourth Circuit's reluctance to foreclose such a possibility, the Magistrate Judge explained that "far be it for [the Magistrate] to take the view that dual capacity actions are foreclosed." Report and Recommendation, pages 17-18. The same holds true for this court. The court will not do what the Fourth Circuit, despite multiple opportunities, has not done. The defendants' first objection to the Report and Recommendation, therefore, shall be OVERRULED.

B. Objection 2 - *The Willfulness of the Alleged FLSA Violation:*

CSB's second objection to the Magistrate Judge's filing is that "[c]ontrary to the Report's recommendation ... any alleged FLSA violation by CSB was not willful." Defendants'

Objections, page 4. When coupled together, the defendants' first and second objection form what is, essentially, a statute of limitations argument. Stated succinctly, the defendants seek dismissal of Smith's individual and collective capacity claims on the ground that they are barred by the statute of limitations because he failed to file his opt-in consent from either at the time the suit was filed or within the applicable limitations period.

It is undisputed that plaintiff Smith did not file a consent to join the collective action until May 14, 2002, which was beyond two years but less than three years from the date his cause of action accrued. Additionally, it is undisputed that the limitations period under the FLSA is two years, unless there are genuine issues of material fact concerning willfulness on the part of the defendants, which could extend the limitations period to three years. 29 U.S.C. § 255(a). What is disputed, however, is whether CSB violated the FLSA and, if it did, whether such violation was willful. The Magistrate Judge recommended that the court answer in the affirmative to both of the preceding two contested issues. It is to this latter recommendation that the defendants object.

The crux of the defendants' objection is that, as a matter of law, any alleged FLSA violation by CSB was not willful. As noted earlier, Congress has provided two separate limitations periods for non-willful and willful violations of the FLSA, two years and three years respectively. 29 U.S.C. § 255(a). As the defendants correctly state, "[t]o benefit from the three year limitations period under § 255, Smith must demonstrate that CSB's alleged FLSA violation was willful." Defendants' Objections, page 16. A violation is willful if an employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute. *McLaughlin v. Richland Shoe Co.*, 486 U.S.128 (1988).

In support of their contention that there has been no willful violation of the FLSA, the defendants argue that the Magistrate Judge

> mistakenly shifts the burden of proof to CSB to establish that any alleged violation [of the FLSA] was not willful. Relevant jurisprudence requires that Smith bear the burden to prove that any alleged violation was willful in order to invoke the three year limitations period for such violations. Smith has offered no competent evidence to dispute CSB's evidence of non-willfulness as is his burden.

Defendants' Objections, page 4.

Plaintiff Smith concedes that both he and "Magistrate Judge Crigler relied on Central Security Bureau's own evidence, submitted in support of its motion for summary judgment, in concluding that a factual issue with respect to willfulness precludes summary judgment." Plaintiff's Response to Defendants' Objections, page 6. Despite the defendants' contention to the contrary, however, the mere fact that the plaintiff did not present his own evidence to establish willfulness does not mandate an entry of summary judgment in favor of the defendants. Instead, "summary judgment ... is mandated where the facts and the law will reasonably support only one conclusion." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). If the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party, then there are genuine issues of material fact. *See Anderson*, 477 U.S. at 248.

There is evidence in this case, albeit evidence produced by the defendants, that there are genuine issues of material fact pertaining to willfulness. Specifically, when construed in a light most favorable to the non-moving plaintiff, the evidence reasonably shows that CSB knew or disregarded knowledge of the fact that partial-day deductions were not permissible for salaried

employees. As the Magistrate Judge explains, because "there is evidence that Defendants deducted time allotted to partial-day absences pay from the pay of so called 'salaried' employees, their action reasonably could be construed as willful." Report and Recommendation, page 21. Moreover, "there is evidence that Defendants further declined to pay proper overtime to employees they classified as exempt but whom they knowingly treated as hourly." *Id.*

The defendants contend that by recommending a denial of their motion for summary judgment, the Magistrate Judge is requiring "CSB to prove non-willfulness, when *McLaughlin* and its progeny reiterate that the plaintiff bears the ultimate burden of proof on the issue." Defendants' Objections, page 20. The defendants mistakenly interpret the Magistrate's recommendation for a denial of summary judgment as a shift in which party bears the ultimate burden in this controversy. Nothing in the Magistrate's Report and Recommendation, or in this court's opinion, is inconsistent with *McLaughlin* and its successor cases. The plaintiff still bears the ultimate burden in this civil action. Put differently, plaintiff Smith cannot prevail on his claim at trial without proving each and every element by a preponderance of the evidence. Denying the defendants' motion for summary judgment does nothing to alter this ultimate burden.

After reviewing the record, and for the reasons stated herein and in the Magistrate Judge's Report and Recommendation, the court shall find that there are genuine issues of material fact concerning willfulness on the part of the defendants, which could extend the limitations period to three years. The defendants' second objection to the Magistrate Judge's Report and Recommendation, therefore, shall be OVERRULED.

C. Objection 3 - *Whether CSB Paid Field Supervisors on a Salaried Basis:*

The willfulness issue notwithstanding, the defendants' final objection is that, contrary to the Magistrate's Report and Recommendation, and "as a matter of law, CSB properly paid field supervisors on a salaried basis." Defendants' Objections, page 4. In *Auer v. Robbins*, 519 U.S. 452, 461 (1997), the Supreme Court articulated a two-part test to aid lower courts in determining whether an employer properly has established salary-based employment. Specifically, courts are to inquire into whether (1) there is evidence of actual impermissible deductions or (2) the employment policy of the defendant creates "a significant likelihood of impermissible deduction."

As evidence of actual impermissible deductions, plaintiff Smith points to two separate incidents in which he received less than his normal working salary.[4] These deductions were in the pay periods June 25, 1999 through July 8, 1999 and January 7, 2000 through January 20, 2000. The defendants argue that these two pay periods represent the first and the last weeks in which Smith was employed as a field supervisor. CSB then notes that under the relevant statute and regulations, "failure to pay full salary in the initial or terminal week of employment is not considered inconsistent with salary basis of employment." 29 C.F.R. § 541.118(c).

While it is undisputed that Smith's terminal week of employment was encompassed in the January 7 through January 20 pay period, the parties disagree as to whether the June 25 through July 8 period was the plaintiff's first pay period in his new position. If it was, as the defendants

[4] Additionally, before he withdrew from this civil action by court order dated September 5, 2002, opt-in plaintiff Robert Ennis also presented evidence of two instances where his pay was deducted for working less than forty hours in a given week. During the pay periods of April 16, 1999 through April 29, 1999, former opt-in plaintiff Ennis worked a total of seventy-nine hours instead of eighty hours and, as a result, was paid $553.00, instead of his "salary" of $560. Similarly, for the pay period of May 28, 1999 through June 10, 1999, Ennis was docked for working seventy-eight and one half hours and paid only $549.50.

contend, then the deductions taken during the pay periods at issue would be permissible and, as a matter of law, would not affect Smith's status as a salaried employee. If, however, the June 25 through July 8 pay period was not the plaintiff's first pay period in his new position, as Smith argues, then the deduction taken by CSB would be inconsistent with salary basis of employment.

There is evidence in the record supporting both theories. Plaintiff Smith argues that he was promoted on June 17 and, therefore, the June 25 through July 8 pay period would not have been the first in his new position. The defendants, conversely, point to a declaration by Beverly Rowe in which she states that Smith accepted the promotion on June 17, but that the promotion did not become effective until the June 25 pay period. In support of his contention that the aforementioned pay period was not his first in his new position, however, Smith cites CSB's earlier answers to interrogatories in which June 17 was portrayed as the effective date of Smith's promotion. Despite CSB's contention to the contrary, then, there is at very least a factual dispute as to whether actual impermissible deductions were made from Michael Smith's salary.

The defendants contend, however, that any impermissible deductions on their part are subject to cure under the "window of corrections" defense. As set out in the federal regulations, the window of correction defense provides that

> where a deduction not permitted [by the FLSA] is inadvertent, or is made for reasons other than the lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6). This defense, in effect, saves employers from forfeiting their salary basis exemption because of inadvertent or non-work related deductions that later are reimbursed

to employees. *Auer*, 519 U.S. at 463. The *Auer* Court explained, however, that the window of correction defense is available only if the deduction was inadvertent or made for some reason other than lack of work. *Id.* (citing 29 C.F.R. § 541.118(a)(6)). Since *Auer*, the circuit courts considering the window of correction defense have held that the defense is only available to an employer who is found to have objectively intended to pay its employees on a salary basis in the first place. *See, e.g., Takacs v. Hahn Automotive Corp.*, 246 F.3d 776 (6th Cir. 2001); *Whetsel v. Network Property Service*, 246 F.3d 897 (7th Cir. 2001).

As the plaintiff points out, in *Takacs v. Hahn Automotive Corp.*, 246 F.3d 776 (6th Cir. 2001), *cert. denied*, 122 S.Ct. 202 (2001), the Sixth Circuit considered an issue left open by the *Auer* Court, and of utmost importance to this matter. Specifically, the Sixth Circuit addressed the question of whether an employer may utilize the window of correction defense if it had an actual practice of making more than a single impermissible deduction or had a policy that, as here, created a significant likelihood of impermissible pay deductions for salaried employees.

After relying on the Secretary of Labor's interpretation of the window of correction defense, the Sixth Circuit held that the defense was unavailable to an employer that had a policy that created a significant likelihood of impermissible deductions and a practice of making such deductions. *Id.* At 783. The court explained that "[i]n essence, we believe that if employers could simply 'use window of correction to comply retroactively with the salaried-basis requirement,' the 'salary basis' test would be rendered 'essentially meaningless.'" *Id.* (quoting *Klem v. County of Santa Clara*, 208 F.3d 1085, 1092 (9th Cir. 2000) (citing *Yourman v. Guiliani*, 229 F.3d 124, 128 (2d Cir. 2000), *cert. denied*, 532 U.S. 923 (2001)).

As set forth below, CSB has not and cannot establish an objective intention to pay Smith and the other Field Supervisors on a "salary basis" because its own employment policy effectively communicates that deductions will be made in specified circumstances, thereby violating *Auer* and its progeny. CSB, therefore, cannot avail itself of the window of corrections defense. The defendants are left, then, with their argument that there was no actual practice of making impermissible deductions.

Even assuming, *arguendo*, that the defendants are correct and that there was no actual practice of making impermissible deductions, the inquiry is not over. There is still a question as to whether CSB's employment policy satisfies the second prong of the salary-basis test. That policy states, in pertinent part, that "[s]alaried employees are expected to work forty (40) hours each week. If you do not, you will only receive compensation for the hours you work. The state labor law says 'NO WORK; NO PAY.'" Pl.'s Mot. for Part. Summ. J. Ex. 5 (emphasis in original).

Under the salary-basis test, in the absence of actual deductions, the employer still fails the test if its employment policy creates a "significant likelihood" of deductions. *Auer*, 519 U.S. at 461. Specifically, a "clear and particularized" policy, "which 'effectively communicates' that deductions will be made in specified circumstances" would not meet the standard. *Id.* In order to be sufficiently "particularized," the policy must apply only to salaried employees, not both to salaried and hourly employees.

Defendants' counsel conceded during argument at the summary judgment hearing that the relevant portions of the policy apply only to "salaried" employees. The dispositive issue, then,

is whether the policy creates a "significant likelihood" of deductions. The mere possibility of an employee deduction in pay does not defeat an employee's salary status. *Karson v. American College of Cardiology*, 1999 WL 87547 at **3 (4th Cir. 1999) (unpublished) (citing *Auer*, 519 U.S. at 460). When the policy effectively communicates that deductions will be made in specified circumstances, however, the employer violates the FLSA. Such is the case here.

Notwithstanding CSB's contention to the contrary, their employment policy is not "at best vague ... ambiguous ... and broadly-worded." Defendants' Objections, pages 30-31. As the Magistrate Judge notes, the "policy essentially shouts in capital letters, "NO WORK; NO PAY." Report and Recommendation, page 26 (emphasis added). The defendants next argue that the words "no work; no pay" are qualified by the preceding phrase, which states that the policy refers only to Virginia law. According to the defendants, "[t]he policy may effectively communicate Virginia law, but not federal law under the FLSA" because "the policy does not 'effectively communicate' that field supervisors will suffer deductions which the FLSA does not allow." Defendants' Objections, page 31. CSB's contention is unavailing.

Considered in its entirety, CSB's employment policy unambiguously makes clear the likelihood that impermissible deductions will be made. Prior to the policy's referral to the "state labor laws," the policy provides that "[i]f you do not [work forty hours per week], you will only receive compensation for the hours you work." The policy clearly and unambiguously provides that salaried employees will not be paid for forty hours unless they work forty hours. Like the Magistrate Judge, the court fails to see how the policy can be interpreted in any way other than "salaried" employees will be paid only for the hours worked. In short, the policy effectively

communicates that deductions will be made in specified circumstances and, therefore, fails to meet the standard articulated in *Auer*.

As a matter of law, therefore, the defendants' third objection shall be OVERRULED and their motion for summary judgment shall be DENIED. The plaintiffs, conversely, are entitled to summary judgment on the issue of liability, namely, whether the position of Field Supervisor is exempt from the requirements of the FLSA as a salaried basis position. For the reasons set out herein, the court holds that it is not exempt as a matter of law.

IV.

Because neither the plaintiff nor the defendants filed timely objections to the Magistrate Judge's recommended disposition as to the defendants' Motion for Default Judgment, there is no reason for the court to address the issue. In the interest of completeness, however, the court notes that having thoroughly reviewed the entire case and all relevant law, the court is in complete agreement with the Magistrate Judge's analysis. For the reasons articulated in the Magistrate's Report and Recommendation, default judgment shall enter only against collective opt-in plaintiffs James McCormick, Michael Brandon, Joe Domagala, Marvin Lawrence, and Printise Hinton, who should be dismissed for failure to prosecute their claims in the collective action.

V.

For the reasons articulated herein, the court shall (1) GRANT the Plaintiffs' Motion for Partial Summary Judgment and determine as a matter of law that the position of Field Supervisor was not an exempt salary-based position; (2) DENY the Defendants' Motion for Summary

Judgment based on their statute of limitations defense; and (3) GRANT IN PART and DENY IN PART the Defendants' Motion for Default Judgment. Default Judgment shall enter only against collective opt-in plaintiffs James McCormick, Michael Brandon, Joe Domagala, Marvin Lawrence, and Printise Hinton, who should be dismissed for failure to prosecute their claims in the collective action.

Additionally, the court shall OVERRULE the defendants' objections to the Magistrate Judge's Report and Recommendation. The court shall ADOPT the Magistrate Judge's Report and Recommendation in its entirety. The court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court, and argument would not aid in the decisional process.[5] An appropriate Order shall this day enter.

The Clerk of the Court hereby is directed to send a certified copy of this Memorandum Opinion and the accompanying Order to Magistrate Judge Crigler and to all counsel of record.

ENTERED:

_____
Senior United States District Judge

_____
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

[5] Pursuant to *U.S. v. Raddatz*, 447 U.S. 667, 674 (1980), the district court is not required to rehear testimony on which the magistrate judge based his findings and recommendations in order to make an independent evaluation of credibility. Specifically, the Supreme Court found that "[w]e find nothing in the legislative history of the statute to support the contention that the judge is required to rehear the [arguments] in order to carry out the statutory command to make the required 'determination.'"

MICHAEL SMITH,	)	CIVIL ACTION NO. 5:00CV00057
	)	
Plaintiff,	)	
	)	
v.	)	
	)	ORDER
CENTRAL SECURITY BUREAU, INC.,	)	
and	)	
JAMES ROWE,	)	
	)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

as follows:

(1) The defendants' "Objections to Report and Recommendation," filed September 5, 2002, shall be, and they hereby are, OVERRULED;

(2) The Magistrate Judge's Report and Recommendation, filed August 21, 2002, shall be, and it hereby is, ACCEPTED and ADOPTED in its entirety;

(3) The plaintiff's "Motion for Partial Summary Judgment," filed May 1, 2002, shall be, and it hereby is, GRANTED (on issues of liability). As a matter of law, the position of Field Supervisor was not an exempt salary-based position;

(4) The defendants' "Motion for Summary Judgment," filed May 1, 2002, shall be, and it hereby is, DENIED; and

(5) The defendants' "Motion for Default Judgment With Respect to Opt-In Plaintiffs," filed July

15, 2002, shall be, and it hereby is, GRANTED IN PART and DENYED IN PART. Default Judgment shall enter only against collective opt-in plaintiffs James McCormick, Michael Brandon, Joe Domagala, Marvin Lawrence, and Printise Hinton, who should be dismissed for failure to prosecute their claims in the collective action.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and to all counsel of record.

ENTERED:

_____
Senior United States District Judge

_____
Date